2009

Introduction to civil litigation services; Special report 09-1

American Institute of Certified Public Accountants. Forensic and Valuation Services Section

Special Report 09-1

FVS Section

Introduction to Civil Litigation Services

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

NOTICE TO READERS

This special report is intended to provide educational and reference primer material for CPAs and others who provide, or are considering providing, civil litigation services in accordance with the AICPA Statement on Standards for Consulting Services and other applicable standards (see AICPA Consulting Services Special Report 03-1, *Litigation Services and Applicable Professional Standards*).

This document was written by and represents the views of the members of the Litigation Services Task Force of the AICPA's Forensic & Litigation Services Committee as a primer for CPAs wishing to learn more about the provision of litigation services. This special report does not establish standards, preferred practices, or approaches, nor is it to be used as legal advice or as a substitute for professional judgment. Other approaches, methodologies, procedures, and presentations may be appropriate in a particular matter because of the widely varying nature of litigation services and jurisdictional procedures and protocols, as well as specific or unique facts about each client and engagement. Readers are encouraged to consult with legal counsel about laws and local court requirements that may affect the material contained in this special report.

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INTRODUCTION

Purpose of This Special Report

This special report is intended to be an educational and reference primer for the practitioner[1] who provides, or is considering providing, civil litigation services for a client. Litigation services represent one of the many forensic services that may be provided by a CPA in accordance with the Statement on Standards for Consulting Services, *Consulting Services: Definitions and Standards* (AICPA, *Professional Standards*, vol. 2, CS sec. 100).[2]

Scope of This Special Report[3]

This special report is focused on the provision of certain services by the practitioner in connection with civil matters litigated in the federal court system of the United States of America, although certain material may also be applicable to state and local courts, alternative dispute resolution, and international litigation. However, practitioners are cautioned that civil litigation laws, rules, and procedures may vary widely, and they are encouraged to consult with legal counsel about laws and local court requirements that may affect the material contained in this special report.

OVERVIEW OF CIVIL LITIGATION

Civil litigation is the legal process used to resolve a dispute.[4] Civil disputes are either tort or contract cause actions. Tort actions are civil wrongs that result in a remedy of damages to the harmed party. Contract cause actions stem from breaches or other violations of contractual terms.

During the civil litigation process, the party initiating a complaint is the plaintiff. The party subject to the complaint is the defendant. Each party can be referred to as a litigant. The plaintiff and defendant each engage their own attorneys (and consultants or expert witnesses, or both, if deemed necessary) to assist with civil litigation proceedings. The litigants and third parties may change during the litigation process.

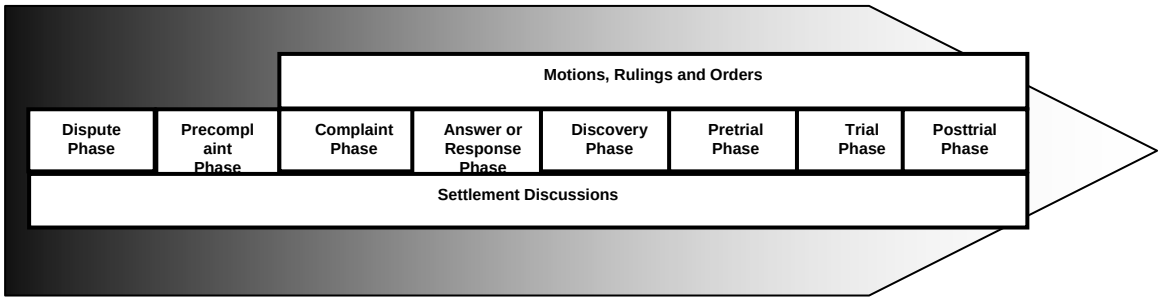
[1] For purposes of this special report, the term *practitioner* refers to a CPA having an active license to practice and a member in good standing with the AICPA. However, much of the material contained in this special report may be helpful to others who provide civil litigation services.

[2] The AICPA has issued additional guidance related to the provision of litigation services (see appendix B).

[3] This special report does not intend to apply to situations where the practitioner may be required to testify as an official custodian of records or as a fact or lay witness, although certain portions may be helpful.

[4] There are many other ways to resolve a commercial civil dispute, including alternative dispute resolution methods that are not addressed specifically in this special report (see also AICPA Consulting Services Practice Aid 99-1, Technical Consulting, *Alternative Dispute Resolution Services*, A Nonauthoritative Guide, 1999).

Chart 1. Overview of Civil Litigation Process.



The phases and activities of the civil litigation process are described in the following sections.

Dispute Phase

A dispute is the subject of the potential or pending litigation involving a disputed fact, claim, or allegation from one party (plaintiff) opposed by a contrary fact, claim, or allegation by another party (defendant). The disputing parties must preserve potentially relevant records when it reasonably is anticipated that litigation will occur.[5]

Precomplaint Phase

Prior to filing a civil complaint, the disputing parties typically gather information related to the disputed fact, claim, or allegation. The plaintiff can use this information to prepare a formal written complaint. The defendant, on the other hand, may attempt to refute claims or identify possible defenses. During this phase of the civil litigation process, the disputing parties may engage in formal or informal negotiations, deliberations, discussions, or conferences to resolve the matter. Voluntary or court-ordered mediations may also be a part of the pretrial process.

Complaint Phase

If the disputing parties are unable to resolve their differences, a formal civil complaint is prepared. Initiated by the plaintiff, the original complaint is the first formal pleading in a civil litigation proceeding.[6] The complaint names the defendant, identifies the court having jurisdiction,[7] describes the legal complaints, and describes remedies or relief requested.

[5] A formal litigation hold communication may be required to suspend existing document retention and destruction policies and practices, together with other actions. Often referred to as "Zubulake" duties, litigation hold communications alone may not be satisfactory to meet the preservation duty and, therefore, counsel from an attorney is typically required in these cases. See *Zubulake v. UBS*, 229 F.R.D. 422 (S.D.N.Y. 2004) and *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 2007 WL 68400, D.Colo. March 2, 2007).

[6] Legal pleadings are generally available through public sources (see appendix G).

[7] The plaintiff may have a choice to file a complaint in federal, state, or another court depending on the claims and issues to be resolved. In the federal system, the Federal District Courts and special courts conduct civil trials (see appendix C).

Once prepared, the complaint is filed by the plaintiff, usually by providing any required documents to the court clerk or records custodian and paying a fee.[8] This administrative process marks the official registration of the complaint, protecting many important legal rights. After filing, the court clerk officially records the documents and, in most cases, assigns a unique case or cause number to the complaint.[9]

The filing of a complaint does not represent official notification of the existence of the complaint to the defendant. This requires official service or delivery of the complaint to the defendant by a court-appointed server, such as a law enforcement officer or another agent of the court. Generally, at the time of service, the defendant must formally acknowledge official receipt of the complaint notice, typically by signature. Subsequently, the defendant is required to appear in court to respond to the allegations or prepare a timely formal written reply.

Excluding certain specialized courts, such as the federal tax court, the disputing parties have the right to request a jury or a bench trial. In a bench trial, the judge serves as the trier of fact (or finder of fact). In either situation, the judge is responsible for all laws applied during the litigation (the interpreter of law). A panel of judges hears any appeal of a trial court decision.

After the filing of the original complaint and continuing throughout the civil litigation process, the disputing parties may ask for a legal ruling or an order by filing a request called a motion (for example, motion to dismiss the complaint, motion to strike a matter, or a motion to suppress potential evidence). Rulings are decisions made by the court or judge on disputed legal issues or other case matters. They represent the opinions and judgment of the court or judge. Orders are the commands, directions, and instructions of the court or judge related to the case.

Answer or Response Phase

In response to the complaint, the defendant prepares an answer or response, which denies or admits each of the asserted facts, claims, and allegations made by the plaintiff. In some instances, the defendant may believe that the complaint fails to meet the legal standard to claim relief and, therefore, the defendant is unable to answer the complaint. This can lead to a pleading called a demurrer. A demurrer attempts to exclude claims without legal merit, regardless of the alleged facts asserted in the complaint. The demurrer and answer, in part, narrow the dispute and identify affirmative defenses.

The answer may also include a cross-complaint**,** or counterclaim, which is a complaint by the defendant against the plaintiff in opposition to the plaintiff's claims. Thereafter, the plaintiff is a cross-defendant. Similar to the complaint, the cross-defendant must answer and defend against the cross-complaint in trial.

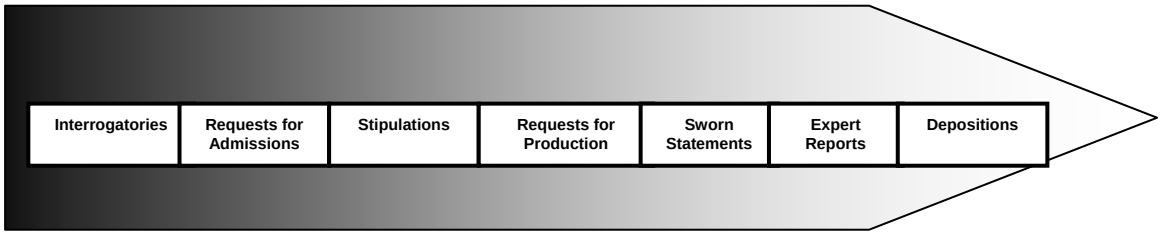
[8] In some cases, the plaintiff can amend the original complaint after filing with the court before the defendant prepares and files a responsive pleading.

[9] The complete record of all documents filed by all parties in the case represents the court's file and includes, without limitation, the original complaint and all other pleadings and papers in the case.

Discovery Phase

Discovery is a process that results in the exchange of information and knowledge between the plaintiff and defendant after the filing of the pleadings in order to prepare evidence for trial.

Chart 2: Discovery Methods.



The methods subsequently described are used to accomplish discovery:

- Interrogatories are questions prepared and submitted to an opposing party that require written answers under oath.

- Requests for admissions are formal written requests for an opposing party to agree to, or deny, the accuracy of disputed facts.

- Stipulations are voluntary agreements between opposing parties about matters relevant to the dispute.[10]

- Requests for production are requests to have an opposing party produce, or make available for inspection and duplication, certain specifically identified materials believed to be potentially relevant to the dispute. The materials may be hard copy or electronically stored information (ESI).

- Sworn statements, or affidavits, are written statements or accounts given under sworn oath and signed out of court. Alternatively, declarations are written and signed out of court statements or accounts usually given by an unsworn witness.

- Expert reports are written disclosures prepared by the practitioner, or any other properly disclosed expert witness, in accordance with Rule 26 of the *Federal Rules of Civil Procedur*e.[11]

- Depositions are out of court oral testimony given by a competent fact or expert witness under sworn oath and recorded in writing, usually by a

[10] For example, a stipulation may take the form of an agreement between the disputing parties on issues of liability or the production of draft versions of expert reports.
[11] Expert disclosure requirements vary widely on a case-by-case basis and between various state and local jurisdictions.

certified court reporter using verbatim, video, or audio recording transcription equipment.[12] Deposition of a fact witness allows the parties to learn any first-hand knowledge that a witness may have about relevant facts in the case. The deposition examination of an expert witness is performed by an opposing party's attorney to determine the qualifications, work performed, and opinions to be given at trial, among other matters.[13] Deposition testimony is normally compelled by serving an enforceable subpoena.

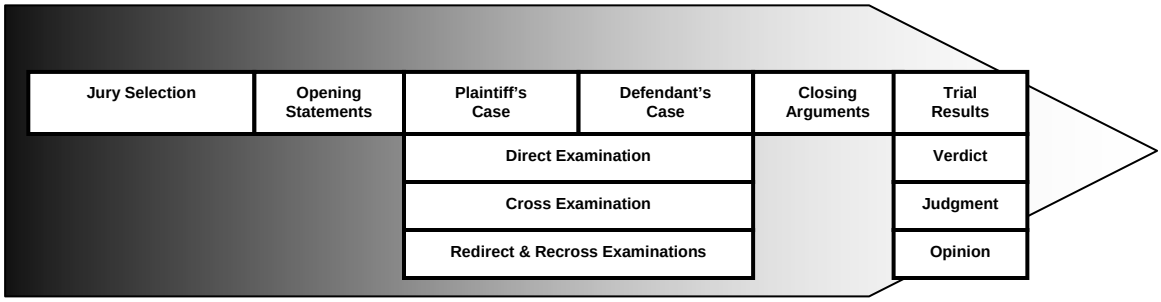
Pretrial Phase

Prior to trial, disputes may be narrowed using information obtained during discovery, through court hearings, and by rulings made and orders issued by the court or judge as a result of numerous pleadings and motions submitted over the course of the civil litigation. In most federal cases, a pretrial or settlement conference is required to take place before trial to encourage the disputing parties to reach a settlement. The vast majority of civil complaints are settled before trial starts.[14]

Trial Phase

The activities typically performed in trial[15] include the following:

Chart 3. Trial Activities.



Jury Selection

As previously discussed in this special report, a trial can either be a jury or bench trial. For a jury trial, the attorneys analyze and may challenge the suitability of potential jurors

[12] The expert witness usually meets with the opposing party's attorney in the form of a deposition. In most cases, the expert witness works with the client's attorney to arrange a mutually agreeable date for the deposition before the close of discovery.

[13] Usually, the expert witness meets with the client's attorney to prepare for deposition. Any discussions or exchange of information during this preparatory meeting may be discoverable.

[14] Settlement of all or a portion of the litigated dispute may take place at any time during the litigation process. Settlement occurs when the disputing parties agree on the outcome and resolution of the claims in the complaint. In certain cases, the judge may be required to approve the settlement terms and conditions.

[15] The expert witness may attend the trial at the request of the client's attorney. However, in some cases, this practice may be prohibited, with the expert witness subject to sequestration from the courtroom until actual testimony from the witness is required.

through a process called voir dire.[16] After the candidates are challenged and accepted by the attorneys, the judge approves the selections and empanels the individual jurors into a jury for trial.

Opening Statements

One of the first activities to begin a trial is the provision of opening statements by the attorneys of the disputing parties. The defendant has the option of deferring his or her opening statement until the time comes to present his or her case later in the trial proceedings. Opening statements allow the attorneys to present an overview of their case by describing the issues and presenting the evidence, decisions, and remedies the jury should find.

Presentation of Plaintiff's Case[17]

In most cases, the plaintiff has the burden to meet the standard of proof and present evidence proving their facts, claims, and allegations. Therefore, it is the plaintiff's obligation to present their case first. This is often referred to as presentation of the plaintiff's case in chief. To prevail, the plaintiff must show that they have met the legal standard to prove the case based on a preponderance of the evidence.[18]

Direct examination is the initial questioning of a witness at trial by an attorney who calls the witness for examination. Direct examination consists of a series of questions designed to solicit admissible evidence from the witness in the form of responsive testimony and other materials. Legal issues about questions, the admissibility of evidence, and witness answers may result in objections from opposing attorneys for subsequent ruling by the judge.

Direct examination is the first opportunity for the expert witness to testify at trial.[19] Prior to hearing the testimony of the expert witness, an opposing attorney may request an opportunity to question the qualifications and suitability of the expert witness in an effort to disqualify the expert witness and limit or exclude testimony. This is often accomplished by the opposing attorney making a motion in limine to ask the court or judge to rule for disqualification or exclusion, sometimes called a "Daubert motion**,**" in accordance with the *Federal Rules of Evidence*.[20]

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[16] Voir dire is also used to challenge an expert witness (also refer to the section, "Presentation of Plaintiff's Case" herein).

[17] In certain cases, a trial may be bifurcated with liability separately tried from causation and damages.

[18] In rare cases, after the presentation of the plaintiff's case, the judge may end the trial with a ruling for a directed verdict because the evidence permits a single reasonable outcome.

[19] The practitioner will often meet with the client's attorney prior to trial to prepare for direct examination questions and, perhaps more importantly, those anticipated during cross-examination (see the "Cross Examination" section herein). In addition, the practitioner may wish to address administrative and procedural matters, such as the time for appearance, parking, check-in, technology use in the courtroom, and attire. Some practitioners arrange to visit the courtroom in advance to preview the setting and logistics.

[20] There are two U.S. Supreme Court cases that set the primary legal precedent for the admissibility of expert testimony in federal cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), (Daubert), and *Kumho Tire vs. Carmichael*, 119 S.Ct. 1167 (1999), (Kuhmo). However, these cases are referenced as guidance only and do not necessarily comprise all factors and considerations related to the admissibility of expert witness testimony (see appendix F).

Following the direct examination, the initial examination of a witness by the opposing attorney is the cross-examination. Cross-examination is limited to issues and facts raised during direct examination but, often, latitude is given to this requirement. In cross-examination, an attorney can use leading questions that are prohibited in direct examination. Frequently, deposition testimony is used to impugn the witness. Cross-examination is often the most challenging and difficult part of civil litigation services provided by the expert witness.

After the cross-examination is completed, the attorney responsible for direct examination has another opportunity to question the witness though redirect examination. Redirect examination is limited to facts and issues addressed during cross-examination. Generally, redirect examination is used to clarify any witness answers and respond to any perceived damage done to the credibility and reliability of the witness.

Recross examination is conducted by the opposing attorney after redirect examination, and it is restricted to matters raised in redirect examination. Therefore, this examination tends to be narrow in scope and brief.

Presentation of Defendant's Case

If resolution is not achieved, the plaintiff rests their case, and the defendant presents their case. The defendant calls witnesses and introduces evidence at trial. The examination of the defendant's testimony and evidence is similar in process to the presentation of the plaintiff's case, with direct, cross, redirect, and recross examinations.

Depending on the trial judge, when the defendant completes the presentation of their case, the plaintiff presents a responsive rebuttal case. Likewise, the defendant may be provided the opportunity for a surrebuttal response.

Closing Arguments

After the disputing parties have concluded the presentation of their cases and rested, each side makes a closing argument. A closing argument is a summary of the case and evidence designed to convince the judge or jury that one disputing party has won the case (or, the other party has lost) and, therefore, should receive a favorable decision. The judge provides jury instructions in a written statement to inform the jury of the law applicable to the case.

Trial Results

Subject to posttrial consideration by the judge of any briefs submitted and other matters, a trial ends in the following results:

- Verdict is the formal final decision rendered by the jury to the court in a jury trial or by a judge in a bench trial. Verdicts are either general or special in form. A general verdict decides all issues in favor of one party or the other, plaintiff or defendant. A special verdict decides only the facts at issue in the case, and the

judge decides how the law applies to each issue. For a special verdict, the jury is asked to make a number of decisions about issues in the case.

- Judgment is the judge's formal official decision about the case.[21] If a judge accepts the verdict from a jury, it becomes the judgment. For bench trials, the verdict of the judge is the judgment. In relatively rare instances, the judge may set aside the jury verdict, referred to as a judgment as a matter of law.

- Opinion is the decision of the judge typically disclosed in a prepared written opinion statement describing the reasons and including interpretations of the law.

Posttrial Phase

After the trial, the judge may ask the opposing disputing parties to file court briefs describing the merits of each case, including issues proven, factual findings, and applicable law. The judge may use these briefs, in part, to write opinion statements for the case.

In addition, a losing disputing party has the right to appeal the trial court's decision to a superior court if they believe the judge made a reversible legal error. In these cases, an appeals court reviews the original record of the lower court to decide if a legal error occurred and, if so, the appropriate action to be taken to address the error.

In cases where a judgment of damages is required, it is sometimes necessary to prepare a final calculation of the amount of damages, including applicable pre- and postjudgment interest and any penalties, attorney fees, exemplary, punitive, or other damages awarded by the court. In cases with large numbers of beneficiaries, such as class actions, the practitioner may assist with the quantification of the judgment and awards and to determine the amount allocated to each individual party.

ROLES OF THE PRACTITIONER

The practitioner may be retained to serve in the following roles in connection with civil litigation:

Expert witness. A person qualified and, if required, disclosed to render an opinion in civil litigation. If the practitioner is formally designated as an expert witness, all work that the practitioner has performed and all written materials and communications (including e-mails, hand-written notes, and draft reports) related

[21] In some cases, a disputing party may make a motion requesting summary judgment**,** requesting that the judge decide on judgment before the start or completion of trial. In other cases, a civil complaint may be terminated with no further litigation proceedings through dismissal**,** especially before trial starts.

to the litigation are potentially subject to being produced to opposing parties through discovery.

Lay (Fact) witness.[22] A person who provides relevant testimony based on his or her firsthand knowledge.

Percipient witness.[23] A person who provides relevant testimony based on his or her perceptions.

Consultant. A person retained to advise about facts, issues, strategy, and other matters. The consultant does not testify unless the consultant's role subsequently is changed to an expert witness. The consultant's work is generally protected from discovery by legal privilege (see also "Legal Privilege" under the section, "Other Civil Litigation Services Considerations").

Other. In addition to the roles of expert witness and consultant, the practitioner may serve without limitation as a trier of fact, special master, court-appointed expert, referee, arbitrator, or mediator.

[22] For example, the practitioner may be called to testify as a lay person about the performance of forensic investigation procedures and the discovery of relevant evidence and facts prior to litigation.

[23] For example, the practitioner may be used as a percipient witness to express perceptions because of his or her professional and technical qualifications related to the testimony.

Chart 4. Civil Litigation Services.

Dispute	• Damages quantification • Dispute development and preparation • Early dispute resolution • Fact finding • Investigations
Precomplaint	• Complaint preparation • Damages quantification • Early case assessment and budgeting • Fact finding • Liability assessment (limited)
Complaint	• Case management • Case strategy (consulting only) • Class action certification • Motion support
Answer	• Response preparation • Counterclaim preparation
Discovery	• Case strategy (consulting only) • Damages quantification • Deposition assistance • Document, data and evidence identification, recovery, analysis, management • Expert witness deposition testimony • Interrogatories and responses • Production requests and responses • Rebuttal of opposing expert testimony • Witness preparation
Pretrial	• Trial preparations • Trial demonstratives • Settlement and resolution support
Trial	• Expert witness testimony • Opposing expert cross-examination assistance • Trial preparation • Witness preparation
Posttrial	• Calculation of beneficiary allocations • Distribution of judgments and awards

GUIDANCE APPLICABLE TO CIVIL LITIGATION SERVICES

In addition to the guidance and standards of the AICPA (see appendix C), the practitioner must adhere to other guidance specifically applicable to civil litigation. Therefore, before beginning any substantive work, the practitioner should identify and understand any guidance applicable to the practitioner's work. In most cases, this information can be obtained from the client or attorney. If not, the practitioner should perform research or alternatively engage an attorney to determine relevant and applicable guidance. Following are some considerations for understanding the guidance applicable to civil litigation services.

Laws, Statutes, and Regulations[24]

Depending on the type of dispute and associated issues, laws and statutes exist that apply to civil litigation services. Federal, and most state laws, specifically address allowable legal remedies for causes of action, the admissibility of evidence, and expert witness disclosures and testimony. For instance, federal laws define monetary damages for many types of claims as well as methods for calculating pretrial or prejudgment interest.

Federal, State, and Local Requirements

Federal, state, and local litigation requirements differ (see appendix I, "State Bar Association Web Site Addresses," of AICPA Practice Aid 05-1, *A CPA's Guide to Family Law Services*). As such, the practitioner must understand and follow the appropriate processes, standards, procedures, rules, and protocols applicable to each jurisdiction.[25] Federal civil litigation is governed by the *Federal Rules of Evidence* and *Federal Rules of Civil Procedure* (see appendix B). Many state and local courts also use or refer to these rules.[26]

Case Precedent

Judges presiding over litigation also may follow legal case precedent in certain cases by using prior case decisions applicable to similar facts and issues to the case at hand. Therefore, it is important to know and understand any legal precedent that may potentially affect the practitioner's work and opinions. In most cases, this information can be obtained from the client or attorney.

Court and Other Authoritative Orders

A court or judge may issue orders in a case applicable to the disputing parties and, at times, the practitioner and others. If deemed applicable, the practitioner should obtain and adhere to the order.

Orders commonly requested by motion and applicable to most cases include the following:

- Protective, confidentiality, or nondisclosure orders require the maintenance of confidentiality for materials produced by the disputing parties. This type of order may require the practitioner to read, acknowledge understanding, and sign prior

[24] The practitioner, unless appropriately licensed and authorized to practice law for the matter at hand, should not practice law or provide opinions on legal issues. Instructions and interpretations of law applicable to the practitioner's services should be obtained from the client's attorney.

[25] Certain states have statutes and associated regulations related to CPA mobility that may preclude testimony from a practitioner serving as a CPA expert witness unless that practitioner has an active license to practice public accounting in that state. However, most states have adopted exceptions for CPA expert witness testimony for litigation purposes.

[26] State court requirements are generally found online at www.ncsconline.org or may be obtained by calling local court officials.

to beginning any work.[27]

- Scheduling or calendaring orders,[28] setting out the deadlines for the civil litigation proceedings and, if possible, an expected trial date.
- Orders to compel discovery or production require a response to a valid discovery request.

Internal Literature

In addition to the standards and guidance of the AICPA, many practitioners have internal guidance for the acceptance and provision of civil litigation services. Practitioners should consider carefully any internally prepared guidance related to the acceptance and provision of civil litigation services because this guidance may be subject to discovery by opposing parties in cases where the practitioner is serving as an expert witness.

OTHER CIVIL LITIGATION SERVICES CONSIDERATIONS

General Considerations

Legal Privilege

When engaged to serve as a litigation consultant, the practitioner's communications, work, and work product may be subject to legal privilege.[29] Privilege is an evidentiary rule that gives the client or attorney, or both, the option to not disclose a fact or information asked for from the practitioner even though it might be relevant in litigation (especially when the information was originally communicated in a professional or confidential relationship). The practitioner should be mindful that the privilege belongs to the client. Privilege applicable to a practitioner typically falls into one of the following categories:

CPA (accountant)-privilege.[30] The protection afforded to a client from an accountant's unauthorized disclosure of materials submitted to or prepared by the accountant.

Attorney-client privilege. The attorney's client's right to refuse to disclose and to prevent any other person from disclosing confidential communications

[27] The practitioner should confirm that a confidentiality order allows for the retention of CPA work product and working paper documentation and complies with the terms of the engagement letter. In addition, the practitioner should carefully evaluate security, including physical and electronic access, related to confidential materials received and under their control and custody, as well as retention requirements.

[28] The practitioner should obtain the scheduling order as soon as practicable after acceptance of the engagement to ensure compliance with discovery schedules, submission requirements, and other important deadlines.

[29] It is important for the practitioner to discuss with the client's attorney to what extent the practitioner's communications, work, and work product is to be protected by legal privilege because it will dictate communications and how the work is directed, documented, and disclosed. In instances where legal privilege will be, or may be, asserted, the practitioner should confirm communication and documentation protocols, identify work product on its face as privileged, and consider including this understanding in the engagement letter.

[30] CPA (accountant) privilege varies widely among federal, state, and local jurisdictions.

between the client and the attorney.

Attorney work-product privilege (or rule/doctrine). The rule that provides for qualified immunity of an attorney's work product from discovery or compelled disclosure.

Marital privilege. A spouse's right to refuse to disclose confidential communications between the married couple.

Engagement Acceptance

Guidance for the acceptance of a civil litigation services engagement is included in the standards, practice aids, and special reports of the AICPA (see appendix B). However, several areas require special attention as described in the following material.

Conflicts of interest are incompatible interests between the practitioner and others connected to the civil litigation services engagement.[31] A conflict of interest exists when a practitioner's ability to objectively evaluate and present an issue for a client will be impaired by current, prior, or possible future relationships with parties to the litigation (see AICPA Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*, 2008). Conflicts may be legally prohibitive or incompatible from the business perspective of the practitioner.[32] Legal conflicts of interest generally preclude the practitioner from accepting the engagement. Business conflicts require an assessment of economic risk and reward for the practitioner. In some cases, conflicts of interest are known, acknowledged, and waived by the parties; however, the member practitioner, in particular, should exercise caution to avoid improperly disclosing any relationship or service to others that may violate professional client confidentiality standards.

The scope of services refers to the expected role for the practitioner and others in the case and the related nature, timing, and extent of work to be performed.[33] It is critical that the practitioner obtain an initial understanding about the scope of services prior to accepting

[31] Before allowing the disclosure of any material facts about a case, the practitioner should complete a search for conflicts of interest. In connection with this search, the prospective client or client's attorney should provide the practitioner with the names of the parties and a brief description of the claims. This typically can be accomplished by asking for a copy of the complaint. In situations where the practitioner deals exclusively with the prospective client's attorney prior to engagement, it is recommended that the practitioner meet the ultimate client to establish communication and service expectations.

[32] Conflicts may include interests between the potential client and attorney, opposing parties and attorney, and unnamed but associated third parties to the dispute. Accordingly, the practitioner should undertake efforts to identify all potentially relevant parties to be considered during the conflict-checking process. If a conflict of interest exists, the practitioner should not accept the engagement or, alternatively, attempt to resolve the conflict, if possible. The parties and entities causing a conflict of interest for a member practitioner generally should not be disclosed to the potential client or others due to professional client confidentiality standards.

[33] In connection with obtaining an initial understanding about the role and scope of services, the practitioner should identify and consider any significant limitations. Potential limitations may include the adequacy of the time period for completion of the services, availability of key witnesses, and the recoverability of documents, data, and records, among other items.

an engagement.[34] If the practitioner decides that the role, scope, or limitations are unacceptable, the engagement should be declined.

Engagement Letter

The AICPA Consulting Services Special Report 04-1, *Engagement Letters for Litigation Services*, 2004, will assist the practitioner with the preparation of engagement letters for litigation services engagements. However, it is important to emphasize the importance of defining the client and documenting the engagement understanding with the client or attorney, or attorney's client for civil litigation services. Cases also exist when the court or judge is required to approve the retention of the practitioner, for example a court-appointed expert[35] or, in bankruptcy matters, the practitioner may not be able to secure a standard engagement letter.[36] In addition, before engagement, the practitioner may be asked to execute and comply with contractual agreements such as a confidentiality or nondisclosure agreement to protect confidential and proprietary information of the parties.

Scheduling

Due to the nature of litigation, the practitioner may be approached to accept a civil litigation services engagement close to deadlines for disclosure, reporting, and trial. This often presents challenges for the practitioner to complete the engagement, especially in cases where the completion of a sufficient amount of work is necessary to support expert opinions. In these circumstances, the practitioner should carefully consider the expected scope and timing of the work before accepting an engagement.[37]

Timekeeping, Fees, and Billings

Rules and requirements related to fees, expenses, timekeeping, and invoicing vary depending on the jurisdiction, court,[38] judge, law, and attorney preferences. In practice, the majority of practitioner fee arrangements for civil litigation services engagements is based on hourly rates and actual expenses incurred.[39] In addition, the practitioner may

[34] Civil litigation is dynamic, and the scope and roles often change. Accordingly, the practitioner should periodically confirm the scope of services, roles, and limitations.

[35] *Federal Rules of Civil Procedure*, Rule 706 (see appendix D).

[36] In these situations, if a standard engagement letter cannot be secured, the practitioner should seek to obtain a properly executed court order with language satisfactory to the practitioner prior to initiating any work. It may be appropriate for the practitioner to engage an attorney to provide counsel in these types of situations.

[37] In certain cases, it may be possible to request and secure from the court an extension of scheduled deadlines.

[38] Certain courts have specific timekeeping, disclosure, and invoicing requirements. For example, in federal bankruptcy court, the practitioner is required to apply for approved retention and disclose the proposed arrangements, including compensation and expenses to be charged. Once retained, the federal bankruptcy courts also require time to be kept and invoiced in one-tenth of an hour increments and described in detail. Arrangements, services, time, fees, and expenses invoiced in federal bankruptcy court are available to interested parties for analysis, objections, and possible denial.

[39] Contingent fees arrangements are almost never acceptable for an expert witness. Laws in many jurisdictions preclude expert contingent fees, as do the ethics rules of many bar associations, including rules of the American Bar Association. Even if an expert witness was in a situation that did not preclude a contingent fee by law or rule, a contingent fee creates the appearance that the expert witness lacks objectivity because fees are potentially dependent on the favorable testimony of the expert, or perhaps the

elect to collect an advance cash retainer, a common practice for civil litigation services engagements.

In most cases, when the practitioner is working as a civil litigation consultant, the fees and invoicing information are protected by the attorney's client's legal privilege and is not discoverable. Conversely, as an expert witness, the practitioner should treat all timekeeping, invoicing, and billing information as subject to discovery.[40] Furthermore, expert witness fees may ultimately be recoverable in some circumstances thereby causing invoices to undergo additional scrutiny.

Expert Witness Considerations

Opinions

When the practitioner will serve as an expert witness, it is important to get an initial understanding of the areas and topics on which the client or attorney, or both, expects the practitioner to offer and form opinions.[41] This understanding should be confirmed periodically by the practitioner because clarifications and the addition of new topics are common during the course of litigation. In general, the practitioner may be asked for opinions in three areas: liability, causation, and damages.

A liability opinion assists the trier of fact to determine the fault or legal responsibility of the disputing parties. A causation, or proximate cause opinion, helps the judge or jury understand to what extent the alleged bad acts caused the claimed monetary damages in the case.[42] The damages opinion is the most commonly requested expert opinion from the practitioner. It is the quantification of monetary damages based on legally acceptable theories of remedy.[43]

If the practitioner determines a requested expert opinion is inappropriate, improper, or impossible, the practitioner should inform the potential client or attorney, or both, promptly and consider rejecting the assignment. Care should be taken by the practitioner to avoid accepting and performing assignments to reach expert opinions that are unsupportable or overreaching, or both.

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successful outcome for the practitioner's client. Regardless of the fee arrangements, it is advisable for the practitioner to collect any outstanding balances prior to expert testimony to avoid unintentionally creating a contingent fee arrangement, or the perception of one.

[40] The *Federal Rules of Civil Procedure* require the expert witness to disclose the compensation to be paid in the case (see appendix D).

[41] In most cases, an expert opinion is exclusively the individual practitioner's and not a firm's or employer's. Therefore, expert reports typically are signed individually by the practitioner.

[42] The expert witness, if often asked to analyze damages by proving or alternatively assuming "but for" the bad acts of another, the harm would not have occurred.

[43] The client's attorney may ask the expert witness to assume liability or proximate cause, or both, when calculating damages or rebutting the computations of others. The practitioner should consider the risks and dangers of adopting such assumptions if they are unreasonable or untested.

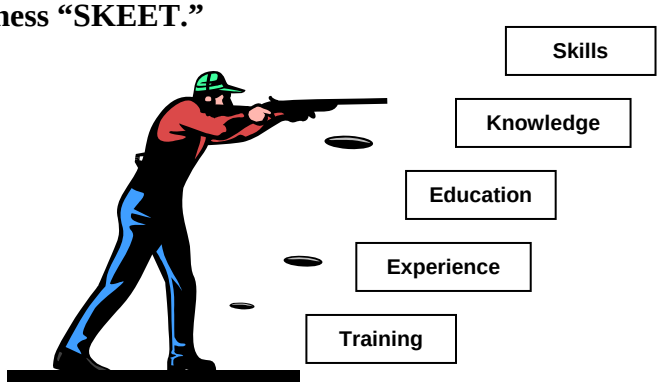
Communications

Generally, all communications between the expert witness and the client or the client's law firm, as well as any materials or information developed or received, whether oral or written, will not be protected by applicable legal privileges and, therefore, are discoverable.

Qualifications

The witness' qualifications are a significant factor for the practitioner and prospective client or attorney to evaluate prior to the practitioner serving as an expert in any case.[44] To evaluate personal qualifications, the practitioner should thoroughly assess skills, knowledge, education, experience, and training (SKEET). Depending on the facts and circumstances of the matter, broad-based accounting, auditing, economic, financial, and forensic SKEET may be sufficient. In other cases, the practitioner may need to pay particular attention to the need for current, case-specific, and uniquely relevant qualifications demonstrated by industry skills, specialized technical expertise, or closely related work experience, among many other items. In addition to SKEET, the practitioner should carefully consider the experience and communication skills needed to testify effectively and convincingly in adverse proceedings.

Figure 1. Expert Witness "SKEET."



The practitioner should also be aware that once he or she is disclosed as an expert witness, an opposing attorney is likely to scrutinize the practitioner's reputation, published works, prior testimony and opinions, and other matters in an effort to challenge qualifications or discredit and limit the practitioner's expert testimony. If the practitioner is unqualified to serve as an expert, the practitioner should inform the prospective client or attorney, or both, immediately and decline the assignment to serve as an expert. Refer to appendix D.

Independence, Integrity, and Objectivity

The AICPA Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*, 2008, provides the practitioner with educational and reference material on the professional requirements related to independence, integrity, and objectivity. A practitioner providing civil litigation services

[44] It is common for the practitioner to provide a professional resume or CV to the potential client or client's attorney to assist with this determination.

must comply with professional standards for integrity and objectivity. A practitioner should also be mindful of the potential impact that litigation services may have on the independence requirements of existing or future attestation services to the client. When a practitioner's independence is impaired, the member is precluded from performing attest services for the client; however, the member may perform nonattest services (such as civil litigation services) for a client that is not an attest client, without regard to whether he or she is independent.

However, if the expert witness lacks independence of mind or objectivity or demonstrates bias, this may raise serious questions about credibility, reliability, and believability of the expert witness.[45] If the practitioner believes the services cannot be performed with an independent mind and with integrity and objectivity, then he or she should inform promptly the client or attorney, or both, and decline the engagement.

Work Performed

The expert witness will perform a potentially wide range of procedures as necessary under the circumstances and scope of engagement. Some of the procedures that the expert may perform include, but are not limited to, the following:

- Read case pleadings and filings
- Read and analyze relevant documents, records, data, and other materials
- Perform financial and data forensics and analysis
- Conduct research and studies
- Interview witnesses or subject matter specialists
- Calculate monetary damages

Staffing and Supervision

As an expert witness, the practitioner is ultimately and directly responsible for the staff assigned to each task and the supervision of the work performed.[46] Failure to assign staff with the proper experience and qualifications and appropriately direct and supervise work performed may adversely affect the quality and reliability of the expert's opinions. In addition, an opposing attorney may attack the foundation or basis for any opinions offered by the practitioner in situations where the work performed was not directed and supervised personally by the expert.[47]

Subpoena

A *subpoena*, which is Latin for "under penalty," compels the expert witness to appear for the meeting or deposition subject to a penalty for failure to comply. A subpoena duces

[45] It may also put the member practitioner in a conflict of interest situation or cause an unwanted production of the practitioner's or practitioner's firm's or company's work product prepared in connection with client services unrelated to the litigation services engagement through discovery. Therefore, the practitioner should carefully consider the potential risks inherent with these issues before agreeing to serve as an expert witness.

[46] The practitioner in an expert report or testimony often confirms the direction and control exercised by the practitioner over staff and work performed.

[47] In cases where the practitioner is anticipated to be unable to personally direct and supervise the work performed in support of expert opinions, the practitioner should discuss this matter with the prospective client and client's attorney and consider the impact on expected expert opinions and testimony.

tecum also requires the practitioner to bring (or produce in advance) specified documents and records, usually the materials considered by the expert witness in forming opinions and associated work product.[48] The expert witness subpoena is commonly served in person to the expert witness or, alternatively, to the client or attorney on behalf of the expert witness. The practitioner should carefully read the subpoena to ensure compliance. Any concerns or questions about a subpoena should be directed to the client or attorney, or both, or practitioner's attorney.

Expert Reports

The preparation and disclosure of an expert report in federal court is governed by the *Federal Rules of Civil Procedure*, Rule 26, and the *Federal Rules of Evidence* (see appendix D and appendix E).[49] The plaintiff's expert witness report is disclosed to opposing disputing parties prior to the close of discovery to allow sufficient time for deposition, if requested. Typically, the plaintiff's expert witness report is submitted in advance of the defendant's expert witness report.[50] Shortly after disclosure of the plaintiff's expert witness reports, the defendant's expert witness report is disclosed, also before the end of discovery, to provide for necessary depositions. It is important that the expert witness disclose all opinions prior to the closure of discovery because failure to do so may prohibit the expert witness from testifying about these opinions at trial.

In some cases, an expert witness will comment on the disclosures and opinions of the opposing expert witness. This is referred to as a *rebuttal*. After the initial expert witness disclosure, the expert witness may prepare and submit additional responsive or supplemental reports when requested by the client or attorney.

Spoliation

Spoliation is an intentional act to improperly destroy, alter, or conceal evidence. A finding of spoliation is serious and may result in significant adverse consequences to the practitioner and client or attorney. This concept is particularly relevant for the practitioner to consider in connection with the preparation and retention of expert report drafts. Accordingly, the practitioner should discuss with the client or attorney, or both, the protocols to be followed to avoid allegations of spoliation.[51]

Trial Testimony

Generally, the practitioner will be allowed to testify at trial if the expert opinions are based upon sufficient facts or data, are the product of reliable principles and methods, and

[48] If a subpoena duces tecum is served, the practitioner should only produce materials specifically requested. One common practice is to provide requested materials to the client's attorney for review in advance of the meeting or deposition. This allows the attorney an opportunity to confirm and produce only those materials deemed specifically relevant to the request.

[49] Once again, expert disclosure requirements vary widely on a case-by-case basis and between various state and local jurisdictions.

[50] Simultaneous submission by the disputing parties' expert witnesses is also commonplace.

[51] This includes an agreement about the definition of a *draft document* for the particular case. In certain cases, the attorneys representing the disputing parties will agree that drafts of expert reports are not discoverable. However, to be safe, the practitioner may elect to save drafts and provide them to the client's attorney to make a determination regarding production to an opposing party.

the expert witness has applied reliably the principles and methods to the facts of the case. However, as previously mentioned, an opposing attorney may challenge the expert witness through a process called voir dire. The *Federal Rules of Evidence* and case precedent have given the trial judge gate-keeping responsibilities and discretion related to the admissibility of expert witness testimony (see appendix G).

Once qualified and accepted by the court or judge, the expert witness is allowed to rely on hearsay as part of the basis for opinions, a right not afforded to other types of witnesses. Under the federal rules, "the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."

Malpractice

Although cases of financial expert witness malpractice are rare, the practitioner should be aware that standard of care can be challenged. In some cases, certain legal protections for the practitioner can be obtained in the engagement letter (see AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 04-1, *Engagement Letters for Litigation Services*, 2004). An opposing party cannot sue an expert witness for expert witness testimony; however, the practitioner's client or attorney, or both, can ask the court to review the standard of care and adherence to professional standards used by the expert witness.[52]

FINDING A CIVIL LITIGATION EXPERT WITNESS OR CONSULTANT

Many options are available for disputing parties to find a qualified practitioner to serve as an expert witness or consultant for civil litigation. A common method is the use of personal referral networks. Personal referral networks quickly identify practitioners who have performed well for colleagues, friends, and business associates. The networking process is usually informal and based on a phone recommendation or personal endorsement.

Other techniques include case research to find a practitioner with relevant experience or engaging an opposing expert witness who was particularly effective in a previous case. In addition, a number of attorneys utilize trade associations, universities, publications, directories, advertisements, and the many specialty advertisers for civil litigation services.

For some attorneys, the best expert witness or consultant is the practitioner used successfully in the past. This attorney typically has a comfort level with the skills, communication, and strengths (or weaknesses) of the expert witness or consultant. However, the practitioner should exercise caution if repeatedly engaged by the same

[52] This right was established by the appellate court in *Mattco Forge, Inc. v Arthur Young & Co.*, 5 Cal. App. 4th 392 (1994).

attorney or law firm. This may lead to accusations by opponents that the practitioner is tied too closely to the attorney or law firm, creating an appearance of bias.

Regardless of the methods used to find a practitioner, the *Federal Rules of Civil Procedure* generally will be used as a guide to determine the qualifications of the expert witness. The prospective client or attorney, or both, will evaluate SKEET by analyzing the practitioner's resume or curriculum vitae, technical writings, prior expert reports, publications, speeches, and transcripts of previous testimony. In addition, the practitioner is likely to be subjected to a background check, internet research, and references verification. In certain cases, the practitioner is interviewed to determine technical knowledge, demeanor, communication skills, and suitability.

Appendix A – Glossary of Selected Terms[53]

admissibility. The quality or state of being allowed to be entered into evidence in a hearing, trial, or other legal proceeding.

affidavits. A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public.

allegation. A party's formal statement of factual matter as being true or provable, without its having yet been proved.

alternative dispute resolution. A procedure for settling a dispute by means other than litigation, such as arbitration or mediation.

answer. A defendant's first pleading that addresses the merits of the case, usually by denying the plaintiff's allegations.

appeal. A proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court's or agency's decision to a higher court for review and possible reversal.

arbitrator. A neutral person who resolves disputes between parties, especially by means of formal arbitration. Arbitration is a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.

accountant-client privilege. The protection afforded to a client from an accountant's unauthorized disclosure of materials submitted to or prepared by the accountant.

attorney-client privilege. The attorney's client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.

attorney work-product privilege/work-product rule. Qualified immunity of an attorney's work product from discovery or other compelled disclosure. See *Federal Rules of Civil Procedure*, Rule 26(b) (3).

bench trial. A trial before a judge without a jury.

brief. A written statement setting out the legal contentions of a party litigation, especially on appeal; a document prepared by an attorney as the basis for arguing a case, consisting of legal and factual arguments and the authorities in support of them.

bifurcated (trial). A trial divided into two stages, such as for liability and damages.

burden of proof. A party's duty to prove a disputed assertion or charge.

calendaring or scheduling (motion or order). A schedule of the time of court appearances.

case-in-chief. The evidence presented at trial by a party between the time the party calls the first witness and the time the party rests.

case precedent (aka *stare decisis,* or the law of the case). A decided case that furnishes a basis for determining later cases involving similar facts or issues.

causation. A cause that directly produces an event and without which the event would not have occurred. See **proximate cause**.

class action. A lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group.

client. "[A]ny person or entity, other than the member's employer, that engages a member or a member's firm to perform professional services or a person or entity with respect to which

[53] Unless otherwise noted, all definitions adapted from *Black's Law Dictionary*, 3rd pocket edition, ed. Bryan A. Garner, (St. Paul: West Group, 2006).

professional services are performed".[54] However, for civil litigation services, the client is usually the attorney representing an underlying party to the litigation. The underlying party represented by the attorney client is referred to as the attorney's client.

closing arguments. In a trial, an attorney's final statement to the judge or jury before deliberation begins, in which the attorney requests the judge or jury to consider the evidence and to apply the law in his/her client's favor.

civil litigation. Litigation regarding a civil action brought to enforce, redress, or protect a private or civil right; a non-criminal litigation.

complaint. The initial pleading that starts a civil action and states the basis for the court's jurisdiction, the basis for the plaintiff's claim, and the demand for relief.

conflict of interest. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.

confidentiality or non-disclosure agreement. An agreement that protects confidential information or an agreement of secrecy; an agreement protecting the state of having the dissemination of certain information restricted.

confidentiality (order). A court order prohibiting or restricting a party from engaging in conduct, especially a legal procedure such as discovery, that unduly annoys or burdens the opposing party or a third-party witness. See **protective order**.

consultant (litigation). A person or expert, who, though retained by a party, is not expected to be called as a witness at trial.

contract cause actions. Causes of legal action broadly covering any legal duty or set of duties not imposed by the law or tort, especially a duty created by a decree or declaration of a court.

counterclaim. A claim for relief asserted against an opposing party after an original claim has been made, especially a defendant's claim in opposition to or as a set-off against a plaintiff's claim.

court-appointed (impartial) expert. An expert who is appointed by the court to present an unbiased opinion. See *Federal Rules of Evidence*, Rule 706.

compel discovery/production (motion or order). The court forces the party's opponent to respond to the party's discovery request, as to answer interrogatories or produce documents (*Federal Rules of Civil Procedure*, §37(a)).

CPA (accountant)-client privilege. See **accountant-client privilege**.

cross-complaint. A claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action.

cross-defendant. A defendant party to a claim asserted between co-plaintiffs or co-defendants in a case that relates to the subject of the original claim or counterclaim.

cross examination. The questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify.

custodian of records. A person or institution that has charge or custody of records.

damages. Money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

Daubert (motion/test). A method that federal district courts use to determine whether expert testimony is admissible under the *Federal Rules of Evidence*, Rule 702.

declarations. A formal statement, proclamation, or announcement.

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[54] Paragraph .03 of ET section 92, *Definitions* (AICPA, *Professional Standards*, vol. 2).

defendant. A party sued in a civil proceeding.

demurrer. A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.

deposition. A witness's out-of-court testimony that is reduced to writing for later use in court or for discovery purposes.

discovery. Compulsory disclosure, at a party's request, of information that relates to the litigation.

dismissal (motion or order). Termination of an action or claim without further hearing, especially before the trial of the issues involved.

direct examination. The first questioning of a witness in a trial or other proceeding, conducted by the party who called the witness to testify.

directed verdict. A ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict as a matter of law.

dispute. A conflict or controversy, especially one that has given rise to a particular lawsuit.

electronically stored information (ESI). Defined in this special report to mean electronically stored data. (See *Federal Rules of Civil Procedure*, Rule 26(a) (1) (A) and The Sedona Conference® Working Group Series, *The Sedona Conference® Glossary: E-Discovery & Digital Information Management*, The Sedona Conference®, May 2005, www.thesedonaconference.org.)

empanel. To swear in a jury to try an issue or case.

expert report. A report prepared by an expert witness in accordance with court rules and procedures for the purpose of assisting a trier of fact and expressing the opinions of the expert witness.

expert witness. An expert who is identified by a party to litigation as a potential witness at trial.

fact (lay) witness. A witness who does not testify as an expert and who is, therefore, restricted to giving an opinion or making an inference that (1) based on firsthand knowledge, and (2) is helpful in clarifying the testimony or in determining facts (*Federal Rules of Evidence*, Rule 701).

file or filed. To deliver (a legal document) to the court clerk or record custodian for placement into the official record.

finder of fact. See **trier of fact.**

foundation. The basis on which something is supported; especially, evidence or testimony that establishes the admissibility of other evidence.

hearing. A judicial session held for deciding issues of fact or law, sometimes with the witness testifying.

hearsay. Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. Such testimony is generally inadmissible under the rules of evidence.

in limine (motion or order). A pre-trial request or order that certain inadmissible evidence not be referred to or offered at trial. Typically, a party makes this motion when it believes that mere mention of the evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard. See **Daubert (motion/test)**.

interrogatories. Written questions submitted to an opposing party in a lawsuit as part of discovery.

judgment. A court's final determination of the rights and obligations of the parties in a case.

judgment as a matter of law. A judgment rendered during a jury trial—either before or after the jury's verdict—against a party on a given issue when there is no legally sufficient basis for a jury to find for that party on that issue.

jury trial. A trial in which the factual issues are determined by a jury, not by the judge.

lay (fact) witness. See **fact (lay) witness**.

leading question. A question that suggests the answer to the person being interrogated, especially a question that may be answered by a mere "yes" or "no."

legal privilege. A special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty.

liability (legal). The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.

litigant. A party to a lawsuit.

litigation hold. Defined in this special report to mean an order to preserve records that may be relevant to a lawsuit, including any lawsuit that is "reasonably anticipated" to be filed. See *Zubulake v. UBS*, 229 F.R.D. 422 (S.D.N.Y. 2004) and *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, LLC*, 2007 WL 68400, D.Colo. March 2, 2007).

mediator. A person serving as a neutral third party in mediation who tries to help the disputing parties reach a mutually agreeable solution. Mediation is a method of non-binding dispute resolution.

mobility (CPA). Defined in this special report to mean the legal right of a CPA properly licensed in one state to practice public accountancy in another state where he or she is not licensed.

motion. A written or oral application requesting a court to make a specified ruling or order.

non-disclosure agreement. See **confidentiality or non-disclosure agreement**.

opening statement. At the outset of a trial an advocate's statement giving the fact-finder a preview of the case and of the evidence to be presented.

opinion (judge or court). A court's written statement explaining its decision in a given case, usually including the statement of facts, points of law, rationale, and dicta.

order. A written direction or command delivered by a court or judge.

percipient witness. A witness who has perceived the things about which the witness testifies.

plaintiff. The party who brings a civil suit in a court of law.

pleading. A formal document in which a party to a legal proceeding, especially a civil lawsuit, sets forth or responds to allegations, claims, denials, or defenses.

precedent (case). See **case precedent**.

pre-trial conference. An informal meeting at which opposing attorneys confer, usually with the judge, to work toward the disposition of the case by discussing matters of evidence and narrowing the issues that will be tried.

protective order. See **confidentiality (order)**.

proximate cause. A cause that directly produces an event and without which the event would not have occurred. See **causation**.

rebuttal. The contradiction of an adverse party's evidence.

recross examination. A second cross examination, after redirect examination.

redirect examination. A second direct examination, after cross-examination, the scope ordinarily being limited to matters covered during cross-examination.

referee. A type of master appointed by a court to assist with certain proceedings.

requests for admission. In pre-trial discovery, a party's written factual statement served on another party who must admit, deny, or object to the substance of the statement.

requests for production. In pre-trial discovery, a party's written request that another party provide specified documents or other tangible things for inspection and copying.

response. See **answer**.

ruling. The outcome of the court's decision either on some point of law or on the case as a whole.

scheduling or calendaring (order). See **calendaring (order)**.

sequestration. Custodial isolation of a trial jury to prevent tampering and exposure to publicity, or of witnesses to prevent them from hearing the testimony of others.

service. The formal delivery of a writ, summons, or other legal process.

settlement. An agreement ending a dispute or lawsuit.

settlement conference. A meeting by disputing parties in litigation for reaching an agreement to end a dispute or lawsuit. See **pre-trial conference**.

SKEET. Defined in this special report as an acronym standing for "skills, knowledge, education, experience, and training."

special master. A para-judicial officer (such as a referee, an auditor, an examiner, or an assessor) specially appointed to help a court with its proceedings.

spoliation. The intentional destruction, mutilation, alteration, or concealment of evidence, usually a document.

standard of proof. The degree or level of proof demanded in a specific case, such as "beyond a reasonable doubt" or "by preponderance of the evidence."

stipulations. A voluntary agreement between opposing parties concerning some relevant point.

subpoena. A writ commanding a person to appear before a court or other tribunal subject to a penalty for failing to comply.

subpoena duces tecum. A subpoena ordering the witness to appear and to bring specified documents, records, or things.

summary judgment (motion/order). A request or order that the court enter judgment without a trial because there is no genuine issue of material fact to be decided by a fact-finder. That is, because the evidence is legally insufficient to support a verdict in the non-movant's favor (*Federal Rules of Civil Procedure,* §56).

surrebuttal. The response to the opposing party's rebuttal in a trial or other proceeding; a rebuttal to a rebuttal.

sworn statements. A statement given under oath, an affidavit. See **affidavit**.

tort. A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another.

trier of fact (finder of fact). One or more persons, such as jurors in a trial or judge in a hearing, who hear testimony and review evidence to rule on a factual issue.

verdict (general). A verdict by which the jury finds in favor of one party or the other, as opposed to resolving a specific issue.

verdict (special). A verdict in which the jury makes findings only on factual issues submitted to them by the judge, who then decides the legal effect of the verdict.

voir dire. A preliminary examination of a prospective juror (or expert witness) by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury (or as an expert witness).

work-product privilege (rule). See **attorney work-product privilege/work-product rule**.

Zubulake duties. See **litigation hold**.

Appendix B – AICPA Litigation Services Guidance

AICPA *Professional Standards*

AICPA *Code of Professional Conduct and Bylaws*

AICPA *Statement on Standards for Consulting Services*

AICPA *Statement on Standards for Valuation Services*

AICPA Consulting Services Practice Aid 98-2, *Calculations of Damages from Personal Injury, Wrongful Death, and Employment Discrimination,* A Nonauthoritative Guide, 1998

AICPA Consulting Services Practice Aid 99-1, *Alternative Dispute Resolution Services*, A Nonauthoritative Guide, 1999

AICPA Consulting Services Special Report 03-1, *Litigation Services and Applicable Professional Standards,* 2003

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 04-1, *Engagement Letters for Litigation Services*, 2004

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 05-1, *A CPA's Guide to Family Law Services*, 2005

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 06-1, *Calculating Intellectual Property Infringement Damages,* 2006

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 06-2, *Preparing Financial Models,* 2006

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 06-3, *Analyzing Financial Ratios,* 2006

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 06-4, *Calculating Lost Profits*, 2006

AICPA Business Valuation and Forensic and Litigation Services Section Special Report 06-5, *Forensic Procedures and Specialists: Useful Tools and Techniques*, 2006

AICPA Business Valuation and Forensic and Litigation Services Section Practice Aid 07-1, *Forensic Accounting—Fraud Investigations,* 2007

AICPA Forensic and Valuation Services Section Special Report 08-1, *Independence and Integrity and Objectivity in Performing Forensic and Valuation Services*, 2008

Appendix C – Federal Court System Overview

Claims tried by federal district courts must involve a dispute claiming monetary damages in excess of an established minimum, where the plaintiff and defendant reside in different states (referred to as diversity of citizenship),[55] or alternatively, involve an issue of federal law. Appeals of district court trial decisions can be made to the appropriate circuit court of appeals.

In addition to the federal district courts and courts of appeal, federal special courts exist. The U.S. Tax Court hears federal income tax disputes between taxpayers and the Internal Revenue Service. The U.S. Court of Federal Claims tries claims against the federal government or its branches, offices, and employees. The U.S. Bankruptcy Court handles bankruptcy cases. Finally, the Supreme Court is the highest court in the federal system. Generally, to be heard by the Supreme Court, a party must have an adverse decision from a circuit court or other federal trial court, and then petition the Supreme Court to hear the case; the Supreme Court hears only a small fraction of the cases petitioned.

Federal Court System (www.uscourts.gov)

The federal court system consists of the following courts and special courts:

District courts. Involve a dispute claiming monetary damages in excess of an established minimum where the plaintiff and defendant reside in different states, (referred to as diversity of citizenship), or alternatively, involve an issue of federal law. Consists of 93 geographic districts (each state has at least one).

Courts of appeal. The courts used for appeals of district court trial decisions.

Supreme Court. This is the highest appeals court in the federal court system. Generally, a disputing party must have a decision from the court of appeals for the federal circuit and file a successful petition for trial to be granted a trial in the Supreme Court.

Tax courts. The courts used for tax disputes between taxpayers and the Internal Revenue Service.

Court of federal claims. The courts used for constitutional claims against the federal government or its branches, offices, or executives.

Bankruptcy court. The courts used for federal bankruptcy matters.

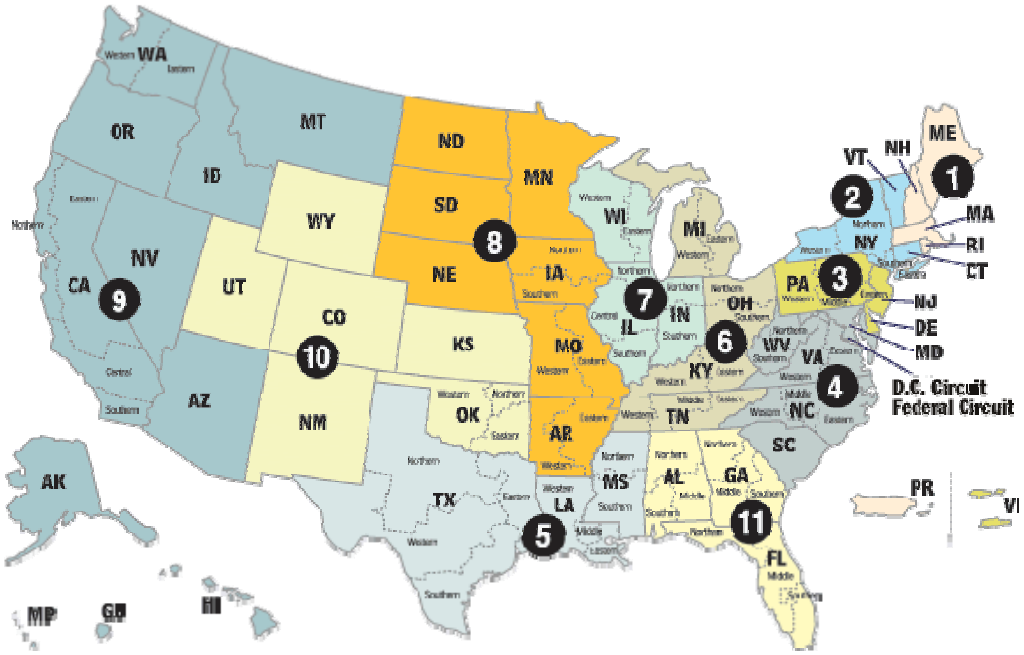
[55] A basis for federal court jurisdiction that exists when (1) a case is between citizens of different states, or between a citizen of a state and an alien, and (2) the matter in controversy exceeds a specific value (*28 U.S. Code § 1332*). *Black's Law Dictionary*, 3rd pocket edition, ed. Bryan A. Garner, (St. Paul: West Group, 2006).

Federal Circuits

Following are the 13 appeals circuits operated by the federal court system:

First. First (Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico)
Second. Second (New York, Connecticut, and Vermont)
Third. Third (New Jersey, Pennsylvania, Delaware, and Virgin Islands)
Fourth. Fourth (Maryland, Virginia, West Virginia, North Carolina, and South Carolina)
Fifth. Fifth (Texas, Louisiana, and Mississippi)
Sixth. Sixth (Tennessee, Kentucky, Ohio, and Michigan)
Seventh. Seventh (Illinois, Indiana, and Wisconsin)
Eighth. Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota)
Ninth. Ninth (California, Arizona, Nevada, Oregon, Washington, Idaho, Montana, Alaska, Hawaii, Guam, and Northern Mariana Islands)
Tenth. Tenth (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming)
Eleventh. Eleventh (Alabama, Georgia, and Florida)
Twelfth. District of Columbia (Washington, DC)
Thirteenth. Federal

Map of Federal Court Circuits (www.uscourts.gov)



Most state court systems are structured like the federal court system. They have trial, appeals, and supreme or superior courts. However, state court types, laws, rules, and regulations may vary significantly.

Appendix D – Federal Rules of Civil Procedure and Evidence

Following are excerpts of the *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence* that apply to an expert witness. The *Federal Rules of Evidence* can be located in their entirety at www.law.cornell.edu/rules/fre/ and the *Federal Rules of Civil Procedure* at www.law.cornell.edu/rules/frcp/. The *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence* are subject to revision.

Federal Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 26. Duty to Disclose; General Provisions Governing Discovery. (a) Required Disclosures. (2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;
(ii) the data or other information considered by the witness in forming them;
(iii) any exhibits that will be used to summarize or support them;
(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or
(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

Rule 26. Duty to Disclose; General Provisions Governing Discovery. (b) Discovery Scope and Limits. (4) Trial Preparation: Experts.

(A) Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
  (i) as provided in Rule 35(b); or
  (ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:
  (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and
  (ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

Federal Rules of Evidence

Rule 702. Testimony by Experts.
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 703. Bases of Opinion Testimony by Experts.
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on Ultimate Issue.
(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.
The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court Appointed Experts.
(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Appendix E – Expert Witness Disclosures

The expert witness is required to adhere to the disclosure requirements of the dispute forum and preferences of the trier of fact having authority over the litigation proceedings. Under the *Federal Rules of Civil Procedure*, Rule 26, and the *Federal Rules of Evidence*, the expert witness must disclose certain matters. Several of these requirements are under consideration and are subject to revision. Presently, these matters, together with optional disclosures, are as follows:

Identification of the dispute (required)**.** Report the title of the case, the jurisdiction, court, or forum where the matter has been filed or will be adjudicated, and the case or cause number assigned. It is also advisable to include this information on all attachments, exhibits, and appendixes to the expert report.

Background (optional)**.** Provide a brief description of the facts and issues in dispute to aid in understanding the expert report.

Assignment (optional)**.** Identify the party that engaged the expert witness and describe what the expert witness was asked to do and any opinions requested.

Qualifications (required)**.** Describe the expert witness's scientific, technical, or other specialized knowledge believed to be able to assist the trier of fact to understand the evidence or to determine a fact in issue. The expert witness must disclose qualifications, including a list of all publications authored in the previous ten years and a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.[56]

Compensation (required). The expert witness is required to provide a statement of the compensation to be paid for the study and testimony in the case.

Professional resume or CV (optional)**.** Include the professional resume or CV of the expert witness as an additional qualification disclosure. This may be appended to the expert report.

Data considered (required)**.** Disclose all materials considered by the practitioner in reaching opinions and preparing the expert report.[57] This includes documents and data produced by the parties during the litigation, as well as research and other materials independently prepared by the practitioner.[58]

[56] Typically, these items are included in the expert witness's CV.

[57] The practitioner should discuss this requirement with the client's attorney to ensure proper compliance. In some cases, the understanding is that all materials received by the expert witness should be disclosed. In others, the disclosure is limited to only those materials received, read, considered, and used to reach the expert witness's opinions.

[58] The practitioner must exercise diligence to retain materials produced to, or prepared by, him or her during the litigation. The practitioner must also preserve the metadata, or information about a thing apart from the thing itself, usually in the form of hidden data about data, generated in connection with electronically stored information. This may be facilitated by using a disciplined approach to receiving,

In connection with the required reporting of data and documents considered, the practitioner should become familiar with evidence considerations such as standards of proof, admissibility, and chain of custody,[59] because these matters may affect the reliance and weight given to certain information considered by the expert witness. In addition, the practitioner is reminded that all materials considered or prepared by the expert witness is generally discoverable and cannot be protected from discovery by legal privilege.

Work performed (required)**.** This, in part, addresses the requirement to disclose the basis and reasons for the expert witness's opinions. This is known also as the *foundation for opinions*.[60]

Basis for opinions (required)**.** In combination with work performed, a description of the fundamental principles used completes the requirement to report the basis and reasons for the expert witness's opinions.

Opinions (required)**.** The practitioner must report all opinions to be expressed by testimony at trial. Failure to comply with the *Federal Rules of Evidence* may result in disqualification of the expert witness, limitations on the expert testimony that can be given at trial, or in severe cases, the exclusion of all testimony.

Exhibits (required)**.** The expert witness must include exhibits expected to be used during the trial to summarize, support, or explain opinions.

inventorying, securing, and maintaining materials received or prepared during the litigation support engagement. For example, bates stamping, or sequentially numbering or date/time marking images as they are scanned or processed, is commonly used to control the dissemination of documents to the expert witness. The failure to properly preserve and disclose expert witness materials may result in unfavorable rulings, sanctions, and other adverse consequences.

[59] The movement and location of real evidence and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court. *Black's Law Dictionary*, 3rd pocket edition, ed. Bryan A. Garner, (St. Paul: West Group, 2006).

[60] The practitioner should avoid describing his or her work in terms generally recognized as assurance services, such as *audit*, *review*, and *compilation*, to avoid any confusion about the work performed.

Appendix F – *Daubert* and *Kuhmo* Case Summaries

Two U.S. Supreme Court cases set the primary legal precedent for the admissibility of expert testimony in federal cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire vs. Carmichael*, 119 S.Ct. 1167 (1999). These cases expanded the role of the trial judge as a gatekeeper for expert testimony.[61]

Daubert v. Merrell Dow Pharmaceuticals, Inc. (http://supct.law.cornell.edu/supct/html/92-102.ZS.html)

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the court addressed scientific evidence offered by an expert witness and its admissibility. In summary, the court held that trial judges are to ensure expert witness testimony based on a reliable foundation and relevant to the task at hand. In general, the *Daubert* ruling consists of two parts:

1. Is the expertise and testimony of the expert witness relevant to matters at issue in the trial?; and
2. Is the testimony of the expert witness reliable because the theory or technique used by the expert
   - can be and has been tested;
   - has been subjected to peer review and publication;
   - identifies the known or potential error rate; and
   - is standardized and generally accepted within relevant peer community?

Kumho Tire vs. Carmichael (http://supct.law.cornell.edu/supct/html/97-1709.ZS.html)

Kumho Tire vs. Carmichael expanded the gatekeeping function of the trial judge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* to all expert testimony based on scientific, technical, or other specialized knowledge, including experience based technical testimony.

[61] These cases are referenced as guidance only and do not necessarily comprise all factors and considerations related to the admissibility of expert witness testimony.

Appendix G – Bibliography and Reference Materials

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